



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 118 OF 1989

IN THE MATTER OF THE ESTATE OF HUSSEINBHAI KARIMBHAI ANJARWALLA (DECEASED)

MICHAEL THOYA MBWANAAPPLICANT

VERSUS

SALIM ANJARWALLARESPONDENT

RULING

1. The proceedings herein relate to the estate of Huseinbhai Karimbhai Anjarwalla (the deceased). From the record, the undisputed facts are that the deceased died testate on 19.2.89 leaving a valid written will dated 19.8.69. A grant of probate of written will was on 10.1.90 issued to his widow Mehmuda widow of Huseinbhai Karimbhai Anjarwalla (Mehmuda) and his brother Saifuddin Karimbhai Anjarwalla (Saifuddin). The grant of probate was confirmed on 23.7.90. Thereafter, Saifuddin died in England on 7.4.95 while Mehmuda died in Mombasa on 16.3.16.
2. By an Petition filed on 13.2.18, the Respondent, Salim Anjarwalla, a son of the deceased sought a grant *ad litem* for the purpose of defending Environment and Land Court Case No. 110 of 21017 (OS) Davis Mwatula Dzuya and Masudi Bakari Musa v Hussein Karimbhai Anjarwalla (ELC 110 of 2017). In ELC 110 of 2017, the plaintiffs therein sought orders of adverse possession of Plot No. MN/I/858 CR No. 8908, Shanzu (the property) registered in the name of Hussein Karimbhai Anjarwalla. The Court did on 18.8.18 issue grant of letters of administration *ad litem* (the Grant *ad litem*) to the Respondent.
3. There are 2 applications before me for consideration. The first application is dated 16.11.18 (the Application for Revocation) in which Michael Thoya Mbwana, the Applicant herein seeks the revocation of the Grant *ad litem*. The second Application is dated 7.1.19 (the Application for Rectification) in which the Respondent seeks rectification of the Grant *ad litem*.
4. The grounds upon which the Application for Revocation is premised as contained in the Application and in the Applicant's affidavit sworn on 3.12.18 are that the proceedings to obtain the Grant *ad litem* were defective in substance. It is further alleged that the Grant *ad litem* was obtained fraudulently by the making of a false statement and untrue allegation essential in point of law to justify the grant. In particular, the Applicant alleges that the Grant *ad litem* alters the name of the deceased as it appears in the death certificate and in the original application herein. The Grant *ad litem* therefore refers to a different person and not to the deceased. The result is that the Grant *ad litem* is now applied to a property of another person and more specifically of the Applicant.
5. The Applicant claims that he is the owner of the property having acquired the same on 21.11.17 vide a Court decree and the same does not belong to the deceased. The decree relates to a different person other than the deceased. Following the issuance of the Grant *ad litem*, the Respondent sought to be enjoined in the Applicant's Environment and Land Court Case No. 410 of 2017 (the Court notes it is actually 410 of 2016 and it shall hereinafter be referred to as ELC 410 of 2016). According to the Applicant, the Respondent is using the Grant *ad litem*, to claim the property. If the orders sought are not granted, the Court will open a way for the Respondent to lay claim over the property which does not belong to the deceased. The Applicant then states that he has no objection to the Grant *ad litem* being rectified so that the name of the deceased conforms to the death certificate and the original application herein.
6. In his replying affidavit sworn on 7.1.19, the Respondent acknowledges that in his application for the Grant *ad litem* the name of the deceased was indicated as Hussein Karimbhai Anjarwalla whereas the death certificate and original application for probate his name was indicated as Huseinbhai Karimbhai Anjarwalla. The Respondent states that at the time he made the application, he was only aware of ELC 110 of 2017 and was not aware of the Applicant's ELC 410 of 2016. Since the Defendant in ELC 110 of 2017 was indicated as Hussein Karimbhai Anjarwalla, the Application for Grant *ad litem* was made by his advocates in that name without giving due regard to the name of the deceased as set out in the death certificate or in the original application for grant of probate. The error was inadvertent and was not fraudulent as the death certificate, will of the deceased original grant of probate which contain the name Huseinbhai Karimbhai Anjarwalla were disclosed. The deceased's name is Hussein and the suffix "bhai" was added as an honorific. The suffix "bhai" is a common honorific used in the Gujirati language and culture to confer respect upon a male person. Further, the property was in the original application for probate listed as an asset of the estate of the deceased as such, it cannot be stated that the Grant *ad litem* relates to a different person or that the property did not belong to the deceased.

7. The Respondent further stated that the issuance of the Grant *ad litem* to him to challenge the Applicant's title to the property is not a valid ground for revocation of the Grant *ad litem*. The Court has jurisdiction to rectify errors in a grant of representation and the Respondent has made an application for rectification of the Grant *ad litem*. The Applicant has stated that he has no objection to rectification of the Grant *ad litem* so that the name of the deceased conforms to that in the death certificate and the original application for grant of probate.

8. In the Application for Rectification, the Respondent seeks that the name of the deceased which is given as Hussein Karimbhai Anjarwalla in the Grant *ad litem* be rectified to read Hussein Karimbhai Anjarwalla also known as Husseinbhai Karimbhai Anjarwalla. The grounds as set out in the Respondent's affidavit sworn on 7.1.19 are that the omission of the name Husseinbhai Karimbhai Anjarwalla by which the deceased was known during his lifetime was as a result of a clerical error on the part of the Respondent's advocates when preparing the Petition from the Grant *ad litem*. That this was the name in the death certificate as well as in the grant of probate. The property was listed as part of the estate of the deceased in the petition for grant of probate. It is therefore desirable that the Grant *ad litem* be rectified by adding the name Husseinbhai Karimbhai Anjarwalla.

9. In a Replying Affidavit sworn on 26.2.19, the Applicant averred that he did on 22.12.16 file ELC 410 of 2016. On 25.7.17, a consent was recorded pursuant to which the Applicant acquired the property. On 18.10.18, on the strength of the Grant *ad litem*, the Respondent filed an application seeking to set aside the decree. The Applicant's advocates raised an objection that the name of the deceased was different from that in the death certificate. According to the Applicant, the defendant he sued in his suit is not the same as the deceased herein. The rectification now sought by the Respondent is intended to defeat the Applicant's case and decree.

10. Directions were taken that the 2 applications be heard together and Parties filed submissions on both applications. For the Applicant, it was submitted in respect of the Application for Revocation that the Respondent in his petition for Grant *ad litem* and affidavit in support thereof made a false statement to the effect of altering the name of the deceased. The name that was given by the Respondent is different from that by which the deceased described himself in his will and also that by which he is described in the death certificate. The Applicant further contended that the matter herein was concluded on 23.7.90 when the certificate of confirmation of grant was issued as such the issuance of the Grant *ad litem* was unlawful and wrong. It was further contended that from the will and death certificate as well as the decree, the names Hussein Karimbhai Anjarwalla and Husseinbhai Karimbhai Anjarwalla are 2 different names. The defendant in the decree was a living person at the time of the decree and not the deceased herein. The Respondent's intention is to cause confusion and to claim an interest in the property which the Applicant obtained vide the decree.

11. For the Respondent, it was submitted that the Applicant is unclear as to the grounds upon which he seeks revocation of the Grant *ad litem*. He has not stated the substantive defect in the proceedings which he says were defective in substance. The Applicant does not state the particulars of the false statement and untrue allegation of facts or of the material concealed from the Court. He has failed to demonstrate the statutory underpinnings on the basis of which the Court can exercise its discretion to revoke the Grant *ad litem*. It was further submitted that the Respondent has admitted that there is a discrepancy in the name of the deceased in the Grant *ad litem* and in the death certificate and in the application for the original grant and had provided a comprehensive explanation for the same. The suffix "Bhai" is not part of a person's name but a common honorific used in the Gujarati language and culture added to the name of a person to confer respect. It does not alter or change the name of a person.

12. The jurisdiction of the Court to revoke a grant is stipulated in Section 76 of the Law of Succession Act which provides:

" 76 A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

13. Revocation of a grant of representation is discretionary. A party seeking the exercise of the Court's discretion to revoke a grant must demonstrate the existence of the foregoing statutory grounds. This was the holding of Mativo, J in John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another [2016] eKLR, where he stated as follows:

The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an

application for revocation or annulment of grant to demonstrate the existence of any, some or all the above grounds.

14. In the present case, the Applicant has alleged that the Grant *ad litem* was obtained in proceedings that were defective in substance. He also alleges that the Grant *ad litem* was obtained fraudulently by the making of a false statement and untrue allegation of facts and the concealment from the court of something material to the case. To buttress his case, the Applicant cited the case of In the Matter of the Estate of Salim Ahmed Salim (Deceased) [2013] eKLR in which Odero, J revoked the grant. The name of the deceased in the death certificate and the will was Salim Ahmed Salim. However there was an error in the gazette notice which gave the name of the deceased as **Said** Ahmed Salim. Counsel for the applicant argued that this was a mere technical error. The learned Judge however stated that **“Those are two very different names and cannot be deemed to refer to the same person.”** It is clear that the names “Salim” is distinctly different from “Said”. In the present case unlike in that case, the Respondent states that the disputed name “Husseinbhai” also refers to the deceased herein and seeks to have it included. The case can therefore distinguished.

15. *The Applicant has further relied on In re Estate of Philip Opuka [2015] eKLR.* The applicant therein had filed an application for rectification under Section 74 of the Act for inclusion of an omitted asset. Mwangi, J found that **“that the application herein is without merit as it has not complied with the relevant provisions of the law.”** The Hon. Judge dismissed the Application not because of the discrepancy in the names but because rectification contemplated under Section 74 of the Act is not for inclusion of omitted assets. The case is therefore not relevant. Similarly, Musyoka, J. in In the Matter of the Estate of Hasalon Mwangi Kahero [2013] eKLR dismissed an application for inclusion of omitted assets that was brought as an application for rectification of grant under Section 74 of the Act.

16. In order for this Court to exercise its discretion in his favour, the Applicant was obligated to establish to the satisfaction of the Court the existence of any the grounds set out in Section 76 of the Act. The Applicant has however not given any particulars of the sweeping allegations of fraud. He has also not stated how the proceedings to obtain the Grant *ad litem* were defective in substance. He has also not stated what false statement or untrue allegation of a fact was made or what was concealed from the Court that was material to the case. My finding therefore is that the Applicant has not demonstrated the existence of any of the statutory grounds for revocation of the Grant *ad litem*.

17. As regards the Application for Rectification, the Applicant submitted that if the Grant *ad litem* is rectified as proposed by the Respondent, a ground of fraud will be opened in ELC 410 of 2016 as it will be claimed that the defendant was already dead at the time the consent therein was recorded. It was further argued that the Respondent cannot claim that there was a clerical error in the petition for the Grant *ad litem* as he is not the advocate who prepared the application. Affidavit must be confined to matters within the knowledge of the deponent. The Applicant urged the Court to reject the annexures relied on and referred to in paragraph 10 and 11 of his replying affidavit sworn on 7.1.19 as the author of the same is not known. Finally the Applicant contended that the law does not envisage the kind of rectification sought by the Respondent. Section 74 of the Law of Succession Act allows minor spelling error. According to the Applicant however, the Respondent seeks rectification of the deceased’s full names and also to add 3 other names of the deceased so that he will be known by 6 names up for the 3 names.

18. For the Respondent, it was submitted that the application for rectification falls within the purview of Section 74 of the Act.

19. The law relating to rectification of grants of representation is found in Section 74 of the Act which provides:

Errors in names and descriptions, or in setting fourth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

20. The procedure for seeking rectification is stipulated in Rule 43 of the Probate and Administration Rules as follows:

Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued.

21. From a careful reading of the foregoing provisions, it is clear that a holder of a grant of representation may seek rectification where is an error in the name or description of any person in the grant. Rectification may also be sought where there is an error in the time or place of death of the deceased. In the case of a limited grant, if there is an error in the purpose for which the same was issued, rectification may be sought. Parliament recognised that mistakes do occur and errors are made and that is why it deemed it fit to include Section 74 in the Act to cater for such mistakes and errors. The rectification is however restricted to the 3 instances set out above.

22. The Respondent acknowledges that there was an error in the name and description of the deceased in the Grant *ad litem* and now seeks to have the error rectified. I doubt that it is the Applicant’s place, not being a family member, to oppose the Application for rectification of the Grant *ad litem* to include the name Husseinbhai Karimbhai Anjarwalla the other name by which the deceased was known. My own view is that the rectification sought by the Respondent falls within the ambit of Section 74 of the Act.

23. The Applicant contends that Hussein Karimbhai Anjarwalla, the defendant in ELC 410 of 2016 is not the same as the deceased herein. The Applicant is therefore apprehensive that if the Grant *ad litem* is rectified, a ground of fraud may be raised as it will be claimed that the defendant was already dead at the time the consent therein was recorded. This will obviously jeopardise his ownership of the property which he got pursuant to the decree issued pursuant to the said consent. The Court has taken the foregoing into account. It is doubtful however whether the rectification of the name of the deceased in Grant *ad litem* will automatically translate in favourable orders to the Respondent in the ELC 410 of 2016. He still has to prove his case and persuade that Court that he is deserving of any orders he seeks therein. In any event, the issue raised by the Applicant is not for this Court. It is for determination of the Environmental and Land Court which is properly seized of the matter.

24. Having considered the position taken by the parties in both applications, it would appear to me that this is an attempt by the Applicant to

block the Respondent from pursuing his application in ELC 410 of 2016 to set aside the consent order and decree. To grant the Application for Revocation and to decline to grant the Application for Rectification will result in the infringement on the Respondent's fundamental right to a fair hearing guaranteed by Article 50(1) of the Constitution of Kenya, 2010 which provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

25. In the end I find that the Application dated 16.11.18 lacks merit and the same is dismissed with costs to the Respondent. The Application dated 7.1.19 is merited and the same is allowed. Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 20th day of September 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

..... for the Respondent

.....Court Assistant